STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 153828

THEODORE PAUL WAFER,
Defendant-Appellant.

Third Circuit Court No. 14-000152-FC
Court of Appeals No. 324018

PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

TONI ODETTE
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-2698

Table of Contents

Table of Authorities

STATE CASES

FEDERAL CASES

STATUTES AND CONSTITUTIONS

List of Attachments[1]

Attachment A	Recording and transcript from defendant's initial 911 call, admitted at trial as People's Exhibits #38 and #39.
Attachment B	Recording and transcript from defendant's statement taken at the scene, admitted at trial as People's Exhibits #162 and #163.
Attachment C	Recording and transcript from defendant's 11/2/13 statement taken at the police station, admitted at trial as People's Exhibits #182 and #183.
Attachment D	Photos of defendant's front door and front door locks. D1: Front of house, People's trial Exhibit #42 D2: Front Door Locks, People's trial Exhibit #102 D3: Front Door, People's trial Exhibit #101 D4: Front Door, People's trial Exhibit #44 D5: Front Door, People's trial Exhibit #48
Attachment E	Photos of defendant's side door and door locks. E1: Side Door, People's trial Exhibit #97 E2: Side Door Locks, People's trial Exhibit #98 E3: Side Door, People's trial Exhibit #158
Attachment F	Photo of the victim on defendant's front porch, admitted at trial as People's Exhibit #43.
Attachment G	Photo of defendant's Mossberg Model 500A 12-gauge shotgun, admitted at trial as People's Exhibit #135.
Attachment H	*People v Hubel*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2012 (Docket No. 302794).

[1]Due to their size, all Attachments are on a CD that will be delivered separately to this Court via US Mail.

Counterstatement of Jurisdiction

The People accept and adopt defendant's statement of jurisdiction.

Counterstatement of Issues Presented

I.

Under *Blockburger*'s "same elements" test, two convictions arising out of the same incident do not violate double jeopardy if each crime has one element the other does not. Here, second-degree murder requires that a defendant act with malice (while statutory manslaughter does not) and statutory manslaughter requires the use of a firearm (while second-degree murder does not). Does the conviction for statutory manslaughter violate defendant's right against double jeopardy?

The Court of Appeals answered, "No."
The trial court answered, "No."
The People answer: "No."
Defendant answers: "Yes."

II.

Jury instruction 7.16a should only be given if the evidence supports that defendant honestly and reasonably believed the victim was breaking and entering into his home at the time of the shooting. Here, there was no evidence that the victim—who, at most, was banging on defendant's side and front doors—was actually in the process of breaking into defendant's home when defendant opened his locked and undamaged steel door and shot the unarmed victim through the locked screen. Did Judge Hathaway abuse her discretion in refusing to give the instruction?

The Court of Appeals answered, "No."
The trial court answered, "No."
The People answer: "No."
Defendant answers: "Yes."

III.

Conduct of the prosecutor warrants reversal only if the claim is properly preserved by a timely objection and the conduct is prejudicial. Here, defense counsel did not, for the most part, object to the prosecutor's conduct, and that conduct was not prejudicial. Has defendant established that he was denied a fair trial?

The Court of Appeals answered, "No."
The trial court answered, "No."
The People answer: "No."
Defendant answers: "Yes."

Counterstatement of Facts

Defendant shot and killed unarmed, 19-year-old Renisha McBride while she was standing on the front porch of his Dearborn Heights house in the early morning hours of November 2, 2013. He was charged with second-degree murder,[2] statutory manslaughter,[3] and felony firearm.[4] After a jury trial before the Honorable Dana M. Hathaway, defendant was convicted as charged on August 7, 2014. He was later sentenced to serve 15-30 years for second-degree murder, 7-15 years for statutory manslaughter, and a consecutive 2 years for felony firearm.[5] The facts of the case are as follows:

On the evening of November 1, 2013—the evening before she was killed—Renisha McBride, the victim, was at her Detroit home spending time with her best friend, Amber Jenkins. From roughly 7:30-9 p.m., the two were playing a drinking game with cards and smoking marijuana. They drank about half a fifth of vodka and smoked around three blunts between the two of them. Amber left around 9 p.m. when Renisha no longer wanted to play the game.[6] When Renisha's mother, Monica McBride, arrived home around 10:40 p.m., she saw Renisha sitting at the dinning room table charging her cell phone and watching television.[7] For roughly five minutes, she spoke with Renisha

---

[2]MCL 750.317.

[3]MCL 750.329.

[4]MCL 750.227b.

[5]References to the trial record are cited by the date of the hearing followed by the page number; 9/3, 39-40.

[6]7/23, 78-83, 96.

[7]Witness Davonta Bynes testified that he was texting with Renisha that evening because he wanted her to come over to his house. He lived on W. Warren between Southfield and Evergreen.

about why the house was not clean. Renisha did not appear to her to be intoxicated. Monica went upstairs to change her clothes. When she came back downstairs around 11:15 p.m., Renisha and her white Taurus were gone.[8]

The next person to see Renisha was Carmen Beasley. Beasley was sitting in the front room of her house on the 7200 block of Brammell in Detroit when, at around 1 a.m. on November 2, she heard a loud noise.[9] When she looked outside, she saw that a white Taurus had hit her husband's Dodge Charger, which was parked on the street. She called 911, noticed that the person in the car was walking away from the scene towards Warren Ave., and then went outside. When the driver—whom she eventually learned was Renisha—came back, Beasley asked her if she was okay. Renisha replied that she was okay, but that she wanted to go home.[10] Renisha sat back in her car. When Beasley asked her if she had a cell phone or if there was anyone she could call for her, Renisha said she did not know where her phone was. Beasley noticed blood on her right hand.[11]

Beasley went inside to again call 911 because she felt Renisha needed an ambulance. When she came back outside again, Renisha was still there. Beasley told Renisha that the ambulance was on its way. Renisha kept repeating that she wanted to go home. Beasley noticed that Renisha was

---

He talked to her on the phone at some point around 10-11 p.m. and said she was slurring her words like she had possibly been drinking, but that she sounded like she was having a good time. He gave up on her coming over around 12 a.m. 7/28, 15-21.

[8]7/23, 61, 65-67. Monica did not see her daughter again until she identified her body at the medical examiner's office the following day.

[9]Id 111-114.

[10]Id at 123, 129-133.

[11]Id at 133-135.

scared, staggered when she walked, and was holding her hands on both sides of her head. Beasley assumed she was drunk, but did not smell alcohol on her.[12] Before the ambulance arrived, Renisha walked away towards Warren Ave. again. She never returned.[13]

Two other witnesses outside that night where the crash took place testified similarly. Syphonia Page was in her driveway on Brammell around 1 a.m. when the crash occurred. She saw the white car run into her neighbor's car.[14] When she approached the driver—later identified as Renisha—Page noticed Renisha was babbling and saying she wanted to go home. She said Renisha was not belligerent or cursing, just disoriented.[15] Paris Pace, who was parked on Brammell at the time, said she noticed the white car driving down the street because it seemed to her that the car was going a little too fast for a residential street.[16] She then saw the white car swerve and hit the other car. When Pace asked the driver—again, Renisha—if she was okay, Renisha nodded yes. Renisha seemed "out of it." After walking back and forth a few times, Renisha eventually left the scene and that was the last she saw her.[17]

Renisha's car was towed after she left the scene. Days later, evidence technician Mark Perrinello went to the tow yard to see the white Taurus. He recovered Renisha's cell phone in the front seat area of the car. He also photographed the damage to the vehicle, including extensive

---

[12]Id at 149.

[13]Id at 135-144.

[14]7/24, 40-43.

[15]Id at 44-61.

[16]Id at 74-76.

[17]Id at 77-89, 92.

damage to the front passenger side, a deployed air bag, and cracks in the windshield.[18] He also retrieved samples from the blood found in the car, which were later tested and shown to be Renisha's blood.[19] Crash scene reconstructionist Kevin Lucidi eventually went to the scene of the crash, where he determined that Renisha was likely driving 31-43 m.p.h. when the crash occurred. He also said the spider-like crack in the windshield could have been caused by Renisha's head hitting the windshield.[20]

Renisha's whereabouts from roughly 1:20 a.m., when she left the scene of the crash, to roughly 4:40 a.m., when she was killed by defendant Theodore Wafer on the porch of his home located at 16812 West Outer Drive in Dearborn Heights, are unknown. What is known is that, at 4:42 a.m. that morning, defendant called 911, saying he "shot somebody on my front porch with a shotgun banging on my door." After the call abruptly ended, the 911 dispatcher, Valentine Peppers, called him back to get more information. Defendant told him he shot the victim—later identified as Renisha—by accident and that he thought the gun was unloaded.[21]

Sergeant Rory McManmon was the first on the scene at roughly 4:46 a.m.[22] He asked defendant what happened and defendant said there was a "consistent knocking" on the door. When

---

[18]7/24, 158-164.

[19]7/24, 164-167; 7/28, 171.

[20]7/28, 63-66.

[21]This transcribed 911 audio recording is attached to this brief as Attachment A. It was admitted during trial as the People's Exhibits #38 and #39, 7/24, 102-103. The return call was not recorded because their recording system only recorded incoming calls. 7/24, 102-109.

[22]7/24, 10-18.

he opened the door, he was "kind of like who is this and then the gun discharged."[23] The entire conversation was recorded. Defendant then signed a consent form allowing the police to search his home and was detained in the back of Corporal Ruben Gonzalez's squad car until he was later taken to the police station for more questioning.[24]

While being questioned at the police station, defendant said he heard banging noises on the side and front door.[25] He said he should have called the police first, but he was mad and wanted to find out what was going on. "I'm piss and vinegar now," he said about his state of mind when he went to the door. He said he opened the door, the gun discharged, and "unfortunately" a person was standing there. He did not expect the gun to go off and there was no deliberate pointing or firing. He did not know when he had loaded the shotgun, but said it could have been months ago. The first thing he did after the shooting was to call the police. He did not say anything about not being able to locate his phone. He also did not say anything about the screen being dislodged when he fired the shot. To the contrary, he encouraged the officer to measure his height against the screen to determine the angle of the shot. Later in the interview, he said it was a "violent banging" on the door like maybe somebody was trying to get in or needed help.

At trial, defendant testified that he purchased the gun in 2008 to keep in his house for self-defense, but had just loaded it around October 19, 2013—about two weeks before the

---

[23]This transcribed recording is likewise attached to this brief as Attachment B. It was admitted at trial as People's Exhibits #162 and #163, 7/24, 17-19. Defendant makes much of the fact that defendant says the term "self-defense" during this exchange. But, as defendant himself clarified during trial, he was describing the *weapon*, not his actions. 8/4, 185.

[24]7/23, 172-178.

[25]This recorded and transcribed interview is attached to this brief as Attachment C. It was admitted at trial as People's Exhibits #182 and #183, 8/4, 223-224.

shooting—because his car had been paint-balled.[26] He had the gun "ready to go," but kept the safety on.[27] Around 4:30 a.m., he heard banging on the side of the house and then at the front door.[28] He turned off his TV and all lights so that nobody would see him. He claimed for the first time that he looked all around the house for his cell phone, but could not find it.[29] He said the banging was so loud that the floor was vibrating and he described it as "undescribably loud and violent."[30] He said that he thought he heard metal hitting the door. He said (again for the first time) that he originally got a bat, but then when the banging continued, he retrieved his shotgun from the closet.[31] He did not remember taking the safety off. He testified that he opened the door to investigate because he was not going to cower in his house and be a victim.[32] He said for the first time at trial that he noticed the screen was dislodged when he opened the door.[33] He testified that, when he opened the door, he saw a person come from the side of his house so he raised his gun and shot. The entire incident happened in one to two minutes. "It was them or me," he said.[34]

---

[26]8/5, 66-68.

[27]8/4, 190-191.

[28]8/4, 198-199. He never heard any knocking on the back door. 8/5, 29.

[29]8/4, 201-202, 8/5, 19-24.

[30]8/4, 200, 219.

[31]8/4, 205-206.

[32]8/4, 207.

[33]8/4, 210.

[34]8/4, 220.

Defendant's neighbor, Ray Murad, testified that he was awake during the relevant time. About 10-15 minutes before he heard the shot, he went outside because he could hear what sounded like a tree hitting the top of his car and wanted to make sure nobody was outside his house. When he did not see anyone, he went back inside.[35] He did not see anyone at defendant's house.[36] He did not hear anything else from outside until he heard the gunshot. After he heard the shot, he saw the police at defendant's house within two to three minutes.[37]

The police responded two to three minutes after the 911 call was placed. When they arrived, there was a bullet hole in the screen of the front, locked screen door.[38] The house was brick with steel doors.[39] The screen insert of the screen door was dislodged and hanging down roughly 8-9 inches. There were no pry or kick marks on the doors. The screen insert, while off its frame, did not appear to be pushed, kicked, or stretched. There was no damage to the doors or door handles and no evidence of forced entry.[40] There were three lifts taken from the front door, none of which were

[35]7/28, 38-42.

[36]7/28, 47.

[37]7/28, 38-44, 47-49.

[38]7/23, 170; 7/29, 156; See Attachment D for photos of defendant's front door, admitted at trial as Exhibits #42, #102, #101, #44, and #48.

[39]7/29, 13.

[40]7/24, 126-130; 7/29, 147-153, 156, 160-162; 7/30, 14. See Attachment E for photos of the side door and locks, admitted at trial as Exhibits #97, #98, and #158.

fingerprints.[41] While two were just smudges, one of the three lifts could have possibly been produced by the screen door insert.[42] The shotgun was found inside the house by the front door.[43]

The victim was found dead on the front porch from an obvious shotgun wound to her face.[44] She was unarmed and her fingerprints were not found on any of the doors. She did not have any burglary tools anywhere on or near her body.[45] She was wearing a sweatshirt, blue jeans, and women's boots with one boot nearly split apart.[46] She was 5'4" and 184lbs. Dr. Kesha, the medical examiner who performed the autopsy, testified that she had a 3.5 inch shotgun wound to her face. Besides some blood on her right hand, he did not notice anything else from his external exam.[47] He did not see any swelling to her hands.[48] He estimated that she was standing less than three feet away from the end of the shotgun barrel.[49] Her blood-alcohol level was .218 and she had both active and inactive metabolites of marijuana in her system.[50] Because the gunshot wound had fragmented her

---

[41]7/24, 173; 7/28, 121-132.

[42]7/28, 140-144.

[43]7/24, 121.

[44]7/23, 170, 7/29, 146. See Attachment F, which is a photo of the victim on defendant's front porch, admitted at trial as People's Exhibit #43.

[45]7/24, 137-138; 7/29, 162.

[46]7/24, 158.

[47]7/30, 112-114.

[48]7/30, 113-114. Defendant's paid expert, Dr. Werner Spitz, testified that his review of the photos led him to believe her hands were swollen. 7/30, 212.

[49]7/30, 120. In Dr. Spitz's opinion from viewing the photographs, she was standing around two feet from the screen. 7/30, 35-36.

[50]7/30, 122-123.

brain, he could not tell if she had a concussion prior to death. The cause of death was a shotgun wound to the head.[51]

The firearms expert who examined defendant's Mossberg Model 500A 12-gauge shotgun found no malfunctions with the gun and concluded that the gun would not go off unless the safety was off and the trigger was pulled using approximately six pounds, five ounces of force.[52] For the gun to fire, one would need to load it, chamber it, slide the safety off, and pull the trigger. In his expert opinion, a shotgun blast from the weapon could absolutely knock out a screen insert.[53]

During closing arguments, the People argued that defendant did not have an honest and reasonable fear of death or great bodily harm when he opened his locked, steel door and shot the victim. Defense counsel, on the other hand, argued that defendant shot in self-defense. The jury deliberated for roughly a day before returning a verdict of guilty as charged. He was later sentenced to serve 15-30 years for second-degree murder, 7-15 years for statutory manslaughter, and a consecutive 2 years for felony firearm.[54] Defendant then appealed by right. The Court of Appeals affirmed defendant's convictions, but remanded for a *Crosby* hearing solely based on the fact that the guidelines are now advisory under *Lockridge*. Additional facts may be presented *infra* in the Argument section of this brief.

---

[51]7/30, 124-133.

[52]See Attachment G, which is a photo of defendant's shotgun, admitted at trial as People's Exhibit #135.

[53]7/29, 76-78, 95-98, 105-106. Defendant also presented a firearms expert, who testified that the screen could have been dislodged before the shooting. His pull-trigger test concluded that it would take 5 pounds, seven ounces of force to pull the trigger. 7/31, 175-181, 183.

[54]9/3, 39-40.

Argument

I.

Under *Blockburger*'s "same elements" test, two convictions arising out of the same incident do not violate double jeopardy if each crime has one element the other does not. Here, second-degree murder requires that a defendant act with malice (while statutory manslaughter does not) and statutory manslaughter requires the use of a firearm (while second-degree murder does not). The conviction for statutory manslaughter does not violate defendant's right against double jeopardy.

Standard of Review

A double jeopardy challenge presents a question of law that this Court reviews *de novo*.[55]

Discussion

Defendant's convictions for both second-degree murder and statutory manslaughter do not violate his right against double jeopardy because second-degree murder does not require the use of a firearm and statutory manslaughter does, and statutory manslaughter does not require malice, which second-degree murder does. In other words, double jeopardy is not offended because each has an element the other does not.

The double jeopardy clauses of the U.S. and Michigan constitutions[56] "protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense."[57] Where the Legislature clearly intends

---

[55]*People v Lugo*, 214 Mich App 699, 705 (1995).

[56]U.S. Const., Am V; Const. 1963, art. 1, § 15.

[57]*People v Calloway*, 469 Mich 448, 450 (2003). See also, *People v Guiles*, 199 Mich App 54, 56 (1993).

to impose multiple punishments under two statutes, double jeopardy is not violated.[58] Conversely, where the Legislature expresses a clear intention in the plan language of a statute to prohibit multiple punishments, it will violate double jeopardy to punish defendant for both offenses.[59] But where the Legislature's intent is not clear—as is the case here—, then courts must apply the *Blockburger*[60] "same elements" test, which this Court adopted in *People v Smith*, to determine whether the dual convictions violate double jeopardy.[61]

A. While the Legislature has not clearly indicated one way or the other whether it intended to authorize multiple punishments for these two offenses, it is clear that they are each aimed at punishing distinct harms.

Here, there is no clear indication whether the Legislature intended to impose multiple punishments for second-degree murder and statutory manslaughter. While defendant states in his brief that the plain language of the second-degree-murder statute indicates the legislature clearly did not intend multiple punishments, the People fail to see how that is clear. Defendant merely quotes both statutes and states, without any real support for his proposition, that the Legislature did not intend for a person to be convicted and punished under both statutes. But the plain language of the statutes says nothing one way or the other about whether the Legislature intended to authorize

---

[58] *People v Smith*, 478 Mich 292, 316 (2007)(internal citations omitted).

[59] *People v Miller*, 498 Mich 13, 17-19 (2015).

[60] *Blockburger v United States*, 284 US 299 (1932).

[61] *People v Smith*, *supra*, 478 Mich at 316; *People v Ream*, 481 Mich 223, 227-228 (2008)(holding that convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate double jeopardy if each offense has an element that the other does not).

multiple punishments for the two offenses. Without any such indication, the Legislature's intent is not clear and defendant points out no authority to the contrary.[62]

While defendant seems to argue otherwise,[63] it is simply not the case that the Legislature never intended to have two homicide-related convictions resulting from a single death. *People v Werner*[64] is illustrative. There, the Court of Appeals held that double jeopardy is not offended when a defendant is convicted of both second-degree murder and operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death. Specifically, the Court stated: "A dual prosecution and conviction of a higher offense and a lesser cognate offense are permissible where the Legislature intended to impose cumulative punishment for similar crimes, even if both charges are based on the same conduct."[65] Citing *People v Kulpinski*, which holds that double jeopardy is

---

[62]Defendant's argument seems to be that the Legislature must not have intended multiple punishments because second-degree murder requires malice, whereas statutory manslaughter does not. But this distinction not only fails to support his argument, but actually helps the People's argument. Much like second-degree murder and OUIL causing death, the two statutes at issue here are designed to prevent separate ills and each contains an element the other does not.

[63]Defendant basically just states that it violates double jeopardy to have multiple murder convictions arising from a single death. But the cases he references, such as *People v Bigelow*, 229 Mich 218 (1988), deal with multiple *murder* convictions. The People do not dispute that it would violate double jeopardy to have two convictions and sentences for, for example, first-degree murder and second-degree murder arising out of one death because second-degree murder is a necessarily lesser included offense of first-degree murder. See *People v Clark*, 243 Mich App 424, 429-430 (2000). In this case, there is one murder conviction for second-degree murder and one manslaughter conviction for statutory manslaughter. Manslaughter is, by definition, not a murder conviction because "malice is an essential element of any murder." *People v Aaron*, 409 Mich 672, 733 (1980).

[64]*People v Werner*, 254 Mich App 528 (2002).

[65]*Id* at 535.

not offended by convictions for both OUIL causing death and involuntary manslaughter,[66] the *Werner* court noted that the two statutes at issue were intended to enforce distinct societal norms and each contained an element not found in the other.[67] Accordingly, the Court found no double jeopardy violation.

This case is no different. The two statutes at issue are intended to prevent different societal harms and each contain an element not found in the other. Statutory manslaughter deals specifically with the discharge of a firearm that is pointed at a person. The Legislature intended to punish the careless use of a firearm even when a defendant acts without the intent necessary to sustain a conviction for common-law manslaughter.[68] Much like the Legislature's intent to prevent drunk driving in the OUIL-causing-death statute, the intent of the Legislature in enacting statutory manslaughter is to prevent the careless use of firearms. Accordingly, it is not clear that the

---

[66]*People v Kulpinski*, 243 Mich App 8, 11-24 (2000)("Statutes prohibiting conduct that is violative of distinct societal norms can generally be viewed as separate and amenable to permitting multiple punishments."); see also *People v Bergman*, 312 Mich App 471 (2015)(holding that convictions and sentences for second-degree murder, OUIL causing death, and driving with a suspended license causing death do not violate double jeopardy).

[67]*People v Werner*, *supra*, at 535-536.

[68]*People v Heflin*, 434 Mich 482, 504 (1990)("In our opinion, in promulgating the involuntary manslaughter statute, the Legislature intended to punish the intentional pointing of a firearm which results in death even though the defendant did not act with the criminal intent sufficient for conviction under common-law involuntary manslaughter."); *People v Maghzal*, 170 Mich App 340, 345 (1988)*; People v Duggan*, 115 Mich App 269, 272 (1982)("We believe that the legislative intent was to punish the intentional pointing of a firearm which results in death even if the defendant did not act in a grossly negligent manner."); *People v Doss*, 78 Mich App 541 (1977), reversed on other grounds, 406 Mich 90 (1979). ("The common sense of all this is that Section 329 was designed to apply in cases of the careless use of firearms, where the accused intended to aim at the victim, but accidentally fired.").

Legislature did not intend to impose multiple punishments for second-degree murder and statutory manslaughter because they are each aimed at preventing and punishing separate societal harms.

B. In addition to punishing different harms, the two offenses each contain an element the other does not.

Further, just like in *Werner*, each offense contains an element the other does not. Under the *Blockburger* same-elements test, offenses are not the same for double jeopardy purposes if each requires proof of an element the other does not.[69] "Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements."[70] The elements of second-degree murder are (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. By contrast, the elements of statutory manslaughter are (1) a death, (2) the death was caused by an act of the defendant, (3) the death resulted from the discharge of a firearm, (4) at the time of the discharge, the defendant was intentionally pointing the firearm at the victim, and (5) the defendant did not have lawful justification or excuse for causing the death.[71]

A basic application of the *Blockburger* test in this case reveals that each offense requires an element the other does not. Second-degree murder requires malice, whereas statutory manslaughter does not. Statutory manslaughter requires the discharge of a firearm, which second-degree murder

---

[69] *People v Smith*, *supra*, 478 Mich 324.

[70] *People v Ream*, *supra*, 481 Mich at 238.

[71] *People v Smith*, 478 Mich 64, 70 (2007).

does not. Thus, because the two offenses each contain an element the other does not, double jeopardy is not offended and defendant's two convictions and sentences should stand.[72]

This analysis is consistent with *People v Smith*, which analyzes the elements of these two offenses and expressly holds that statutory manslaughter is not an inferior offense of second-degree murder and, thus, is also not a necessarily lesser included offense. While *Smith* deals with jury instructions and, therefore, does not specifically address the double jeopardy issue at hand in this case, it nevertheless stands for the proposition that—regardless of whether a firearm was used to cause the death based on the specific facts of any particular case—statutory manslaughter is not a necessarily included offense of second-degree murder because it is possible to commit second-degree murder without first committing statutory manslaughter.[73]

Ultimately, defendant's convictions for both second-degree murder and statutory manslaughter do not violate double jeopardy because the plain language of the statutes does not clearly indicate otherwise, because the two statutes are designed to punish and prevent different harms, and because each offense has an element the other does not. Accordingly, the Court of Appeals did not err in affirming defendant's dual convictions for both offenses.[74]

---

[72]To the extent defendant's argument questions the consistency of the jury's verdict, his argument is without merit because—even if this verdict is inconsistent, which it arguably was not—it is well-recognized that inconsistent verdicts within a single jury trial do not require reversal. *People v Wilson*, 496 Mich 91, 100-10 (2014), quoting *People v Vaughn*, 409 Mich 463, 466 (1980)("[J]uries are not held to any rules of logic nor are they required to explain their decisions.").

[73]*People v Smith*, *supra*, 478 Mich at 69-74.

[74]Judge Servitto's dissent in this case states—without citing any specific authority—that the Legislature specifically prohibited multiple punishments for second-degree murder and statutory manslaughter simply because one crime requires malice and the other does not. But, as the majority opinion points out, this observation regarding the elements of each offense has more to do with whether the verdict is internally inconsistent, not whether double jeopardy is offended.

II.

Jury instruction 7.16a should only be given if the evidence supports that defendant honestly and reasonably believed the victim was breaking and entering into his home at the time of the shooting. Here, there was no evidence that the victim—who, at most, was banging on defendant's side and front doors—was actually in the process of breaking into defendant's home when defendant opened his locked and undamaged steel door and shot the unarmed victim through the locked screen. Judge Hathaway did not abuse her discretion in refusing to give the instruction.

Standard of Review

After all of the evidence had been presented in this case, counsel asked the court to give CJI 2d 7.16a. After hearing argument on the matter, Judge Hathaway decided the instruction was inapplicable to the facts of this case in light of the evidence presented.[75] A trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion.[76] An abuse of discretion occurs if the court's decision falls outside the range of reasonable and principled outcomes.[77]

Additionally, jury instructions are reviewed as a whole, and reversal is inappropriate even if there are imperfections as long as the instructions "adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried."[78] Thus, even where an instruction should have been given, reversal is not warranted unless the defendant can show that the error caused a

---

[75] 8/5, 111-112.

[76] *People v Gillis*, 474 Mich 105, 113 (2006).

[77] *People v Babcock*, 469 Mich 247, 269 (2003).

[78] *People v Dumas*, 454 Mich 390, 396 (1997).

miscarriage of justice, i.e. that it is more likely than not that error was outcome determinative, and the error undermined the reliability of the verdict.[79]

Discussion

Judge Hathaway did not abuse her discretion in refusing to give CJI 2d 7.16a because the evidence did not support the giving of the instruction. Indeed, there was virtually no evidence that the victim, unarmed 19-year-old Renisha McBride, was actively in the process of breaking and entering into defendant's home when he opened his locked steel door—which was undamaged and showed no signs of forced entry—and shot her through his locked screen door. Accordingly, the Court of Appeals did not err in finding that the trial court judge did not abuse her discretion in denying defendant the inapplicable instruction. Further, even assuming, *arguendo*, that the court did err by not giving the instruction, defendant cannot establish that the alleged error was more likely than not outcome-determinative in light of the other instructions given and the evidence presented at trial.

While defendant's version of what occurred on the night of the murder varied each time he was asked, he ultimately decided at trial to testify that he acted in self-defense because it was, to use the phrase defendant eventually used at trial, "them or me."[80] Accordingly, the court instructed the

---

[79] *People v Cornell*, 466 Mich 335, 365 (2002); *People v Lowery*, 258 Mich App 167, 172-73 (2003); MCL 769.26 states: "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."; *People v Lukity*, 460 Mich 484, 493 (1999)("Thus, § 26 creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice.").

[80] 8/4, 220.

jury at length on the law of self-defense. Specifically, and among other things, the jury was instructed to consider all of the evidence in deciding whether defendant acted in lawful self-defense, including how the circumstances appeared to him at the time he acted. They were also instructed that a person is never required to retreat if attacked in his own home and that a person's porch is part of his home.[81] And finally, the Court ended the instructions by stating that the prosecutor had to prove beyond a reasonable doubt that defendant did not act in self-defense.[82]

But, in addition to the lengthy self-defense instructions the court agreed to give, defense counsel also asked for—and was denied—the reading of CJI 2d 7.16a. The instruction, based on MCL 780.951(1), reads in relevant part:

> If you find that—
>
> > (a) the deceased was breaking and entering a dwelling or business, or committing a home invasion, or had broke and entered or committed a home invasion and was still present in the dwelling or business . . . , and
> >
> > (b) the defendant honestly and reasonably believed the deceased was engaged in any of the conduct just described,
>
> you must presume that the defendant had an honest and reasonable belief that imminent [death/great bodily harm/sexual assault] would occur.[83]

The jury instruction is based on MCL 780.951(1), which states in relevant part:

---

[81] 8/5, 168-171

[82] Id at 171. The jurors were also provided a copy of the jury instructions during deliberations. 8/6, 102.

[83] CJI 2d 7.16a.

> (1) [I]t is a rebuttable presumption in a . . . criminal case that an individual who uses deadly force . . . has an honest and reasonable belief that imminent death . . . or great bodily harm to himself . . . will occur if both of the following apply:
>
> > (a) The individual against whom deadly force or force other than deadly force is used is in the process of breaking and entering a dwelling or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises . . .
> >
> > (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a).[84]

After examining the statute and hearing argument on the issue, Judge Hathaway declined to give the instruction because she found it was not supported by the evidence. Specifically, she found there was no evidence that the victim was ever in defendant's house and that there was no evidence that she was in the process of breaking and entering when defendant shot her.[85]

A. Judge Hathaway did not abuse her discretion in refusing to give the instruction because it was not supported by the evidence.

A requested instruction should only be given to the jury if it is supported by the evidence that was presented at trial.[86] But the converse is likewise true: an instruction *not* supported by the evidence should *not* be given.[87] Before CJI 2d 7.16a should be given to the jury, the instruction

---

[84]MCL 780.951(1). The People agree that none of the listed exceptions are applicable in this case.

[85]8/5, 111-112.

[86]*People v Riddle*, 467 Mich 116, 124 (2002).

[87]*People v Wess*, 235 Mich App 241, 243 (1999).

clearly requires there be evidence presented at trial *both* that (1) the victim was in the process of breaking and entering into defendant's home and that (2) defendant honestly and reasonably believed that the victim was breaking and entering into his home.[88]

Generally, in order to establish breaking and entering, there would need to be evidence that the victim both broke into and entered the dwelling.[89] Here, the statute requires that the victim was, at the very least, "in the process" of breaking and entering. While defendant makes much of the fact that *attempted* breaking and entering does not require actual entry, the Legislature clearly did not say that "attempted breaking and entering" was enough to raise the presumption. Instead, the Legislature said that the person (in this case, the victim) must be "in the process" of breaking of entering, which implies more than just attempting. According to the Cambridge Dictionary of American Idioms, "in the process" is defined as "having begun but not yet finished doing something." So, while an "attempt" to break in could be completely thwarted,[90] there has to at least be some measure of success for one to be "in the process" of breaking in.

---

[88]CJI 2d 7.16a.; MCL 780.951(1). While trial counsel complained that the instruction was changed from the disjunctive to the conjunctive during this trial, it was simply altered so that the instruction would accurately reflect the statute upon which it is unquestionably based. The statute, of course, remained unchanged.

[89]The elements of breaking and entering are (1) the breaking and entering of a building, (2) with felonious intent. *People v Cook*, 131 Mich App 796 (1984).

[90]MCL 750.92; *People v Davenport*, 165 Mich App 256 (1987)(A defendant who commits any act toward the commission of a criminal offense, but who fails in the perpetration, or is intercepted or prevented in the execution of the offense, may be found to have attempted the offense.).

Here, there was simply no evidence that the victim was actually in the process of breaking and entering into defendant's home at any point, let alone when he opened his locked door and shot her while she was standing on the porch. Even viewing the evidence in defendant's favor and considering only his trial testimony—which clearly differed from his initial accounts of the event—the victim was "banging" on defendant's side and front door in the middle of the night, which woke defendant up. Defendant's side and front doors were both locked, steel doors. Within a minute or two, he retrieved his shotgun from the closet, concluded he could not find his phone, turned off the safety of his shotgun, and went to his front door to "investigate."

He unlocked the steel door and opened it. He saw a person coming from the side of his house so he raised his gun and shot her while she was, at the very least, a couple feet from his locked screen door. So, while the victim was, according to defendant's trial testimony, "violently banging" on his front and side doors for one to two minutes before he opened his door, there was no evidence that she was trying to—let alone having any success in—actually breaking into his house when he opened the door. In other words, there was no evidence that the victim was actually or any other way "in the process" of getting in, i.e. prying, breaking, lifting, or disarming. Knocking or banging are not "breaking."

None of the so-called pieces of evidence pointed out in defendant's brief lead to a different conclusion. First, he points to the fact that the victim was pounding on the door, leading defendant to believe she was coming in the house. But someone "pounding" on a door is hardly the equivalent to someone being in the process of actually breaking into a home. This is likewise true about the

"fact" that—according only to the defense's paid expert[91]—the victim's hands may have been swollen due to the banging. Again, knocking on someone's doors is not the same as breaking and entering.

Defendant next argues that the victim was breaking in because her boot was damaged. There is nothing to support the assertion that her boot was damaged during the one to two minutes she was banging on defendant's door. Indeed, the photos show it was not just scuffed, but actually broken apart. Next, defendant points to the fact that, when the police arrived, the screen insert was out of place. But even if—and this is a big "even if"[92]—the victim's knocking on the door caused the screen to be dislodged, again this is not evidence that she was in the process of breaking and entering into defendant's home. There is no evidence that she then somehow put her hand through the screen in an attempt to unlock either the screen door or the front door, both of which were locked when she was outside knocking on his doors.[93] Besides the obvious shotgun-blast in the screen, there was no evidence that the screen was damaged, punched in, or kicked in by the victim. Lastly, defendant points to the supposed "footprint" later found on the air conditioner in his backyard. But defendant testified that he did not hear any noise from his backyard or rear door. There is no evidence that the "footprint"— if that is even what it was—occurred that night, let alone that it was left by the victim.

---

[91]Dr. Kesha who actually examined the victim and looked at her hands in person disagreed with this conclusion.

[92]Defendant told the police when he was at the station after the shooting that they would be able to tell how high he'd pointed his gun by looking at where the hole in the screen. He never mentioned the screen was out of place before he shot. Further, he obviously fired through the screen, which could have dislodged the screen.

[93]The same is true for the so-called "woven pattern" on the door that was collected days after the shooting. There is obviously no way of telling how that pattern—even if it was from some sort of screen—got on the door.

And finally, but perhaps most importantly, there is absolutely no evidence that the victim was attempting to enter defendant's home when he opened his door and shot her in the face while the victim was, unquestionably, standing at least a couple feet away from him on his porch. Again according to the self-serving version of events defendant testified to at trial, he opened the door and saw a person coming from the side of his house so he raised his gun and shot. At the time he shot, he did not know the race or gender of the person, let alone whether the person appeared armed. He testified that he pulled the trigger as a reflex reaction to defend himself. Even crediting this testimony, there is no evidence that the victim was in the process of breaking into his house when he shot her. She was shot—unarmed and without any sort of burglary tools on her person—while she was standing on his porch.[94]

Because there was no evidence that the victim was ever in the process of breaking and entering into defendant's home ever—let alone doing so when he actually shot her—Judge Hathaway did not abuse her discretion in refusing to give the instruction. As mentioned *supra*, whether the evidence presented at trial was sufficient to warrant a particular jury instruction is within the sole discretion of the trial court.[95] In turn, the Court of Appeals did not err in rejecting this claim and affirming defendant's convictions.

---

[94]Common sense leads one to believe that burglars generally would be using tools, not their bare hands, to break through a locked steel door.

[95]*People v Young*, 472 Mich 130, 135 (2005).

B. Even if it was error not to give the requested instruction, any such error was not outcome-determinative in light of the other instructions given and the evidence presented at trial

i. Looking at the instructions as a whole, defendant's rights were protected because the jury was clearly told the People had to prove *beyond a reasonable doubt* that defendant did not act in self-defense, which is a higher standard of proof than merely a rebuttable presumption.

Jury instructions are, of course, reviewed in their entirety. Even imperfect instructions do not constitute error if they fairly present the issues to be tried and sufficiently protect the defendant's rights.[96] Here, the jury was instructed at length regarding self-defense. Specifically, among other things, the jury was instructed to consider all of the evidence in deciding whether defendant acted in lawful self-defense, including how the circumstances appeared to him at the time he acted. They were also instructed that, if defendant honestly and reasonably believed that he was in danger of being killed or seriously injured, he could act immediately to defend himself even if it turned out later that he was wrong about how much danger he was in. Likewise, they were told they could also consider how the excitement of the moment affected the choice the defendant made. The jury was also instructed that a person is never required to retreat if attacked in his own home. The court added that a person's porch is part of his home.[97]

The self-defense instructions read to the jury accurately summarized the law on self-defense. In addition, the jury was correctly instructed on the burden of proof. Specifically, the jurors were instructed:

---

[96] *People v Waclawski*, 286 Mich App 634, 678 (2009); *People v Dumas*, *supra*, 454 Mich at 396.

[97] 8/5, 170-171.

> The defendant does not have to prove that he acted in self-defense. Instead, the Prosecutor must prove beyond a reasonable doubt that the defendant did not act in self-defense.[98]

Because the jurors were correctly instructed on self-defense and the burden of proof, defendant's rights were protected even if the court should have read the rebuttable-presumption instruction. Proof beyond a reasonable doubt is a much higher standard of proof than that required of a rebuttable presumption. A rebuttable presumption is one that may be overcome if the evidence demonstrates that the presumption is more likely that not incorrect.[99] In other words, the proof beyond a reasonable doubt standard was more beneficial to defendant than merely a rebuttable presumption.

In *People v Stockwell*,[100] for example, the defendant claimed the trial court erred by not reading an instruction that—because the defendant had previously been involuntarily committed—he was entitled to a "presumption of continuing insanity." Instead, the trial court instructed that defendant was presumed sane, but as soon as contrary evidence was presented by the defendant, then the prosecution needed to prove that the defendant was sane beyond a reasonable doubt. The Court of Appeals determined:

> . . . there is another, more fundamental, reason for rejecting the defendant's argument. The defendant is arguing that he was entitled to a 'rebuttable presumption' of insanity. Instead, the trial judge instructed the jury that the prosecution was required to prove sanity beyond a reasonable doubt. It appears to this Court that the instruction

---

[98]8/5, 168-171.

[99]Black's Law Dictionary defines a "rebuttable presumption" as: "An inference drawn from certain facts that establishes a prima facie case, which may be overcome by the introduction of contrary evidence." Black's Law Dictionary (9th ed). MCL 780.951 does not define the phrase "rebuttable presumption," therefore, this Court may consult the dictionary to "discern the meaning of statutorily undefined terms." *People v Schultz*, 246 Mich App 695, 703 (2001).

[100]*People v Stockwell*, 68 Mich App 290, 293 (1976).

> given was, if anything, more favorable to the defendant than the ones he requested.[101]

The Court of Appeals undertook this exact same analysis in the only case—albeit an unpublished one—where it has considered this same question in the context of self-defense. In *People v Hubel*, the defendant requested and was refused the instruction regarding the rebuttable presumption of MCL 780.951. While the Court found that the trial court abused its discretion in not giving the instruction,[102] it went on to determine that the error was harmless. Specifically, it noted that the jury was instructed that the prosecutor had to prove that defendant did not act in self-defense beyond a reasonable doubt, "a much higher standard of proof than that required of a rebuttable presumption."[103]

The same is true in this case. Defendant claims that he was entitled to an instruction that there was a rebuttable presumption he acted with the proper state of mind for self-defense, but the jury was instructed that the prosecutor needed to prove defendant did not act in self-defense beyond a reasonable doubt. Thus, even if defendant was entitled to the instruction, he cannot establish that he was prejudiced because the jury found that the People proved beyond a reasonable doubt that defendant was not acting in self-defense. There is simply nothing to suggest that the outcome would

---

[101] *Id* at 293.

[102] In *Hubel*, the facts were much different. There, the defendant testified at trial that the victim pounded on his door until someone else inside the house went to open the door. When the door was open, the defendant testified, the victim bowled through the door into defendant's apartment and refused to leave. A physical fight ensued between the victim and another witness when defendant stabbed the victim. *People v Hubel*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2012 (Docket No. 302794).

[103] *Id.*

have been any different had the rebuttable presumption instruction been given. Thus, defendant cannot show outcome-determinative error based on the totality of the instructions given.

ii. Given the evidence presented at trial and defendant's conflicting versions of what occurred, he fails to demonstrate that the court's refusal to give the instruction was outcome-determinative.

In addition to the fact that the instructions as a whole protected defendant's rights, defendant is also unable to show that the court's refusal to read the rebuttable-presumption instruction was outcome-determinative based on the facts of the case. In conjunction with defendant's testimony, the People presented substantial evidence that defendant did not act in self-defense and the jury clearly found beyond a reasonable doubt that defendant was not justified in shooting the victim that night.

The People presented evidence that the 19-year-old victim—who had marijuana in her system and a .218 level of alcohol at the time of death—was in a car crash in a residential neighborhood around 1 a.m. on November 2, 2013. The three witnesses to the car crash all testified that they spoke with the victim before she eventually walked away from the scene. The witnesses said the victim was disoriented, scared, and wanted to go home, but that she was not acting belligerently. Given the cracks in the windshield, she may have had a concussion from hitting her head during the crash. Before police arrived on the scene, the victim had wandered away and was not seen again until she appeared at defendant's house around 4:40 a.m.

At 4:42 a.m., defendant called 911, saying he "shot somebody on my front porch with a shotgun banging on my door." After the call abruptly ended, the dispatcher called him back to get more information. Defendant told him he shot by accident and that he thought the gun was unloaded. When the police arrived, defendant then told the police what happened. He said there was

a "consistent knocking" on the door. When he opened the door, he was "kind of like who is this and then the gun discharged."

When he was taken to the police station that same morning, he said he heard banging noises on the side and front door. He said he should have called the police first, but he was mad and wanted to find out what was going on. "I'm piss and vinegar now," he said about his state of mind when he went to the door. He said he opened the door, the gun discharged, and "unfortunately" a person was standing there. He did not know when he'd loaded the shotgun. The first thing he did after the shooting was to call the police. He did not say anything about not being able to locate his phone. Later in the interview, he said it was a "violent banging" on the door like maybe somebody was trying to get in or needed help.

He gave a different version of events at trial. At trial, he testified that he purchased the gun in 2008 to keep in his house for self-defense, but had just loaded it around October 19, 2013—about two weeks before the shooting—because his car had been paintballed. He had the gun "ready to go," but kept the safety on. Around 4:30 a.m., he heard banging on the side of the house and then at the front door. He turned off his TV and all lights so that nobody would see him. He claimed he looked all around the house for his cell phone, but could not find it. He said the banging was so loud that the floor was vibrating. He originally got a bat, but then when the banging continued, he retrieved his shotgun from the closet. He did not remember taking the safety off. He testified that he opened the door to investigate because he was not going to cower in his house and be a victim. When he opened the door, a person came from the side of his house. He raised the gun and shot. "It was them or me," he said.

Defendant's testimony about the loud banging was not corroborated by his neighbor, who testified that he was awake during the relevant time. About 10-15 minutes before he heard the shot, he went outside because he could hear what sounded like a tree hitting the top of his car and wanted to make sure nobody was outside his house. When he did not see anyone, he went back inside. He did not see anyone at defendant's house. He did not hear anything else from outside until he heard the gunshot. After he heard the shot, he saw the police at defendant's house within 2-3 minutes.

The police responded in two to three minutes after the 911 call was placed. When they arrived, there was a bullet hole in the screen of the front, locked screen door. The victim was dead on the front porch from an obvious shotgun wound to her face. The screen insert of the screen door was dislodged and hanging down roughly 8-9 inches. There was no damage to the doors or door handles and no evidence of forced entry. The victim was unarmed and her fingerprints were not found on any of the doors. The firearms expert who examined defendant's shotgun and concluded that the gun would not go off unless the safety was off and the trigger was pulled using approximately six pounds, five ounces of force.

Given these facts—especially that the victim was not acting belligerently just hours before her death, that the neighbor did not hear any noise, that there were no signs of forced entry, that defendant never mentioned not being able to find his phone until he got to trial, that the unarmed victim was found on defendant's porch with her feet at least a couple feet from the door, that defendant was mad when he opened his locked door, and that defendant could not make up his mind whether he fired accidentally or in self-defense—the rebuttable-presumption instruction would not have made any difference in the outcome of trial. The jury clearly found evidence beyond a reasonable doubt that defendant did not act with an honest and reasonable belief that the use of

deadly force was immediately necessary to defend himself. Thus, any alleged error in not reading the requested instruction was not outcome-determinative.

C. Defendant was not prevented from presenting a defense.

To the extent defendant argues in passing that he was prevented from presenting a defense because the court refused to read the requested instruction, this claim is belied by the record. Defendant's ultimate defense at trial was that the victim was coming at him when he shot her. As defendant stated, "it was them or me." As mentioned above, Judge Hathaway gave the jurors lengthy instructions on self-defense and told them to consider the circumstances as they appeared to defendant at the time. Counsel was, therefore, permitted to argue during closing that defendant was in extreme fear when he opened the door and saw a figure coming towards him. Defendant was not prevented from presenting his defense.

Ultimately, the Court of Appeals correctly held that the trial court judge did not abuse her discretion when she refused to give the instruction, which was not supported by the evidence. Defendant's application for leave to appeal should, therefore, be denied.

III.

Conduct of the prosecutor warrants reversal only if the claim is properly preserved by a timely objection and the conduct is prejudicial. Here, defense counsel did not, for the most part, object to the prosecutor's conduct, and that conduct was not prejudicial. Defendant has failed to establish that he was denied a fair trial.

Standard of Review

Defendant's claim that this issue is preserved is largely incorrect. While counsel did object when the prosecutor inadvertently frightened a juror with the shotgun, she did not object to virtually any of the complained-of comments made by the prosecutors in closing argument or rebuttal. Accordingly, the majority of the alleged errors raised in this issue are unpreserved.

Unpreserved claims of prosecutorial error[104] are reviewed for "plain error affecting defendant's substantial rights."[105] "Reversal is warranted only when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence."[106] It is defendant's

---

[104]Both defendant and the Court of Appeals' opinion repeatedly use the term "prosecutorial misconduct." This is a misnomer in this case because the claim is that the prosecutor legally erred, not that the prosecutor actually committed professional misconduct. As the Court stated in *People v Cooper*, 309 Mich App 74, 87-88 (2015), "In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. *Therefore, we agree that these claims of error might be better and more fairly presented as claims of "prosecutorial error," with only the most extreme cases rising to the level of 'prosecutorial misconduct.'"* (Emphasis added)

[105]*People v McLaughlin*, 258 Mich App 635, 645 (2003).

[106]*People v Ackerman*, 257 Mich App 434, 448-449 (2003).

burden to establish plain error and prejudice.[107] Regarding any preserved errors, such claims of prosecutorial error are reviewed on a case-by-case basis to determine whether defendant was denied a fair and impartial trial.[108]

Discussion

Defendant's second claim should fail because the prosecutor's unobjected-to comments were proper and did not prejudice defendant. Further, even if any portion of the prosecutor's comments were improper, they did not deprive defendant of a fair trial and any potentially prejudicial effect was mitigated by the trial court's instructions to the jury.

Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct."[109] When considering claims of prosecutorial error, the reviewing court must evaluate the prosecutor's remarks in context.[110]

A. The prosecutor did not err when she inadvertently frightened a juror with the shotgun, which the jury had already been told was unloaded and cleared by the deputies.

Defendant argues that the prosecutor somehow intended to frighten the jurors when she picked up the shotgun to show it to defendant during cross-examination. This argument is premised on the fact that the court reporter transcribed that one of the jurors said "whoa whoa whoa" when

---

[107] *People v Carines*, 460 Mich 750, 771 (1999).

[108] *People v Rice (On Remand)*, 235 Mich App 429, 435 (1999); *People v Blackmon*, 280 Mich App 253, 266-267 (2008)(In order for prosecutorial error to rise to the level of a constitutional due process violation, the error must be so severe that the defendant did not have a fair trial.).

[109] *People v Rohn*, 98 Mich App 593, 596 (1980).

[110] *People v Dobek*, 274 Mich App 58, 63-64 (2007).

the prosecutor picked up the gun.[111] But there is nothing on this record that the prosecutor *intended* to frighten the jurors merely by picking up the firearm.[112] As the prosecutor later clarified:

> I never pointed it in the direction of the jury. I was approaching. I was holding—the record should be clear. I was approaching Mr. Wafer. I was holding the weapon at my side. I came around. I never pointed it in the direction of the jury at all. But, you know, the gun is in evidence.[113]

Any "scaring" of a juror was wholly inadvertent on the part of the prosecutor and undoubtedly due to the inherently "scary" nature of a shotgun that was used as a murder weapon.

Further, defendant has not established how frightening a juror is prosecutorial error in the first place. Indeed, the only case cited by defendant in this section is *People v Brocato,* a 1969 case where the prosecutor improperly referenced a polygraph exam, improperly questioned and impeached witnesses, and (among other things) asked the defendant if he believed in God.[114] This case is nowhere on par with that; the prosecutor was free to pick up the murder weapon and cross-examine defendant with it. This claim should fail.

B. Even if the prosecutor inadvertently misstated the law during closing argument—which, for the most part, he did not—any potential misstatements were cured when the jury was properly instructed on the applicable law.

Defendant next argues that the prosecutor, during closing argument, conflated the *mens rea* elements of the homicide offenses and said defendant admitted to many of the elements of the

---

[111] 8/5, 89-90.

[112] See *People v Bahoda*, 448 Mich 261, 266 (1995).

[113] 8/5, 146-147; The jury was told repeatedly throughout trial that the shotgun was unloaded and cleared by the deputies. They were again reminded of that after this incident occurred.

[114] *People v Brocato*, 17 Mich App 277 (1969).

offenses. But none of the complained-of comments—all of which were unobjected to[115]—amounted to error, let alone plain error requiring reversal.

Defendant first takes issue with the prosecutor's example that a person who goes to their door, points a weapon out the door, pulls the trigger, and hits a person on the sidewalk could be charged with second-degree murder.[116] Viewed in context, the prosecutor—who had already correctly listed the elements of second-degree murder, along with the correct definition of malice[117]—was arguing that the jury did not have to find that defendant actually *intended* to kill; it was enough for second-degree murder that the jury find he created a very high risk of death knowing that the act was likely to cause death or great bodily harm.[118] In this context, the prosecutor did not misstate the law when he said that a person who points a gun out the door, pulls the trigger for whatever reason, and hits a person on the sidewalk could, potentially, be charged with second-degree murder depending on the facts.

---

[115]Not only did defense counsel not object to the prosecutor's summary of the law, she expressly agreed with it during her argument: "And Mr. Muscat just put on this good power point about the elements of murder 2. Not [sic] one manslaughter, another manslaughter and felony firearm. I agree with everything he said up there. I completely agree." 8/6, 56.

[116]8/6, 39.

[117]To establish the mens rea for second-degree murder, the prosecution must establish that the killing was "done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Dykhouse*, 418 Mich 488, 508–509 (1984). Here, the prosecutor specifically said that the People had to prove one of three states of mind for the jury to convict on second-degree malice: "That he intended to kill or, and or he intended to commit great bodily harm. And or, he knowingly created a very high risk of death or great bodily harm. Knowing that death or great bodily harm would be the likely result." 8/6, 35. The prosecutor's statement of the law was accurate.

[118]8/6, 34-41.

Likewise, the prosecutor did not err by saying that defendant was not disputing the elements of statutory manslaughter. Obviously the prosecutor acknowledged throughout his entire closing argument that defendant was claiming self-defense; indeed, the gravamen of the prosecutor's argument was that defendant did not act in lawful self-defense. So, when going through the elements of statutory manslaughter, the prosecutor was making the point that—if the jury chose not to credit defendant's self-defense claim, which he'd already mentioned in regard to the other offenses—the elements of statutory manslaughter would be met because defendant obviously admitted to killing the victim with a firearm. The prosecutor did not misstate the defendant's defense. And, even if he did, his closing argument was immediately followed up by defense's counsel's closing argument, which very clearly stated the defendant's defense.

Next, defendant claims the prosecutor misstated the law of self-defense when he said defendant had other options besides opening the door, such as going to another part of his house instead of engaging. Viewed in context, the prosecutor—who had already told the jury that defendant did not have a duty to retreat in his own house[119]—was arguing that defendant had other options available to him such as calling the police or simply not opening the locked door. The prosecutor's point was that, because defendant voluntarily opened the secure door, that helped prove that he shot because he was mad, not because he was frightened.[120] Viewed in context, the statement—while not technically correct if read in complete isolation—was not obviously wrong.[121]

---

[119]8/6, 49.

[120]8/5, 48-54.

[121]While defense counsel did not object to this statement about defendant going to a different part of his home, she did object earlier in the prosecutor's argument when he was talking about the protections one has within their home. Following the objection, the judge instructed the jury that,

Further, even if any of the prosecutor's remarks were erroneous, the jury was clearly and repeatedly instructed that the court's statements about the law were to control regardless of the arguments made by the attorneys. A prosecutor's clear misstatement of the law *that remains uncorrected* may deprive a defendant of a fair trial.[122] But if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured.[123] Here, the jury was correctly instructed about the law, including all of the elements of the offenses, the applicable self-defense instructions, and the full no-duty-to-retreat instruction that says a defendant is never required to retreat in his own home.[124] Thus, even if an error occurred, it was cured by the clear and accurate instructions given to the jury.

C. The prosecutor did not err in her rebuttal argument, which was largely a direct response to defense counsel's closing argument.

Defendant did not object to any of the challenged statements in the prosecutor's rebuttal argument. As mentioned *supra*, review is, therefore, for plain error affecting substantial rights.[125] Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct."[126] When considering claims of prosecutorial error, the reviewing court must evaluate the prosecutor's

---

if the lawyers say anything different about the law, it is the court's instructions that should control. 8/6, 48-49.

[122]*People v Matulonis*, 115 Mich App. 263, 267–268 (1982).

[123]See *People v Federico*, 146 Mich App 776, 799 (1985).

[124]See generally 8/5, 155-171.

[125] *People v Ackerman*, *supra*, 257 Mich App at 448.

[126]*People v Rohn*, *supra*, 98 Mich App at 596.

remarks in context.[127] While the prosecutor may not vouch for the credibility of his witnesses by suggesting he has some special knowledge of the witnesses' truthfulness, he may argue from the facts that a witness is to be believed.[128] "Where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, 'I believe' or 'I want you to convict' are not improper."[129]

Further, where a defendant advances a particular theory of the case, the prosecutor is free to comment on the validity of that theory.[130] Indeed, according to this Court, "[The] central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. . . . To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another."[131]

i. The prosecutor did not err by saying that, in her experience, this was a typical murder case and that defendant was a typical defendant.

Defendant erroneously claims that the prosecutor vouched for defendant's guilt and improperly attacked defendant's credibility when she argued that—in her experience as the head of the Homicide Unit—this defendant was no different than any other typical murder defendant and that his natural instinct was to lie to protect himself.[132] She went on to argue:

---

[127] *People v Dobek*, *supra*, 274 Mich App at 63-64.

[128] *People v McGhee*, 268 Mich App 600, 630 (2005).

[129] *People v Swartz*, 171 Mich App 364, 370-371 (1988)(citations omitted).

[130] *People v Fields*, 450 Mich 94, 115 (1995).

[131] *Id.* at 110-111 (internal quotation marks and citation omitted).

[132] 8/6, 90.

> He's a homeowner. Yes he's a home owner.
>
> Some [sic], does that give you special rights to kill an unarmed teenager knocking on your door. He's a home owner for whatever reason in his life. And you know Ms. Carpenter have asked you a number of times to get yourself inside the head of Ted Wafer.
>
> I don't know that you can do that. I don't know that's, but nonetheless, we have to prove what his actions were. And sometimes you prove intent by what his actions were. You're not gonna be able to get inside his head. You're not him.[133]

This rebuttal argument came immediately after defense counsel's closing argument, where she repeatedly referenced that "Ted" was in his own house when this happened and that a "man's house is his castle."[134] Viewed in context, the prosecutor's argument was a response to defendant's counsel's argument that this case and this defendant were different because defendant was in his house when this occurred.

As mentioned above, a party is entitled to fairly respond to issues and theories raised by the other party.[135] When defense counsel essentially argued that "Ted" was just a regular person trying to get some sleep that night, the prosecutor was then free to argue that defendant's status as a homeowner did not change the fact that he acted like a typical defendant by lying to get himself out of trouble. Viewed in context, the prosecutor's argument about defendant being "typical" was not error.

Further, even if the Prosecutor's statement was improper, any potential error was cured when the trial court instructed the jury not to consider the prosecutor's statements as evidence. Jurors are

---

[133] 8/6, 90-91.

[134] 8/6, 72, 88-89.

[135] *People v Jones*, 468 Mich 345, 352 n. 6 (2003).

presumed to follow their instructions.[136] Accordingly, defendant cannot establish plan error affecting him substantial rights.

ii. The prosecutor did not err by saying her office looks at the law in deciding whether or not to charge a homeowner, but that the "final call" regarding defendant's guilt is for the jury.

Next, defendant erroneously claims that the prosecutor vouched for defendant's guilt by stating:

> Because our job, ladies and gentlemen, is to see that justice is served. Our job is to prosecute the guilty. And your job is to make that determination. You decide whether or not we've done our job properly. That's your decision.
>
> You have to tell us whether or not we've met our burden. We don't run away from our burden. It's our burden. That's what our constitution says. We don't take it lightly that we would charge a home owner. We don't take that lightly.
>
> There's plenty of home owners that haven't been charged. We look at the law. We are guided by what the law requires. And the law in this case required a charge of murder in the second degree. And the intentionally aiming that gun. You guys get to make the final call. There's no self-defense here. Where's the fear? Where's the fear?[137]

"Where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, 'I believe' or 'I want you to convict' are not improper."[138] Further, a prosecutor is free to "relate the facts to his theory of the case, and in so doing say that certain evidence leads him to believe the defendant is guilty."[139]

---

[136] *People v Unger*, 278 Mich App 210, 235 (2008).

[137] 8/6, 96.

[138] *People v Swartz*, *supra*, 171 Mich App at 370-371 (1988).

[139] *People v Humphreys*, 24 Mich App 411, 414 (1988).

Here, the prosecutor was free to argue that, based on the evidence, a charge of second-degree murder was appropriate despite the fact that defendant was a homeowner claiming self-defense.[140] The prosecutor clarified that, while she believed the charge was proper based on the evidence, the People have the burden of proof and it was ultimately up to the jury to decide whether defendant acted in self-defense. She never suggested that she had any sort of special knowledge relating to defendant's guilt; merely that she believed the charge was proper based on the law and the facts, and that it was ultimately the jury's decision.[141]

Further, any potential error was cured by the trial court's instruction to the jury: "To sum up, it is your job to decide what the facts of the case are, to apply the law as I give it to you and in that way to decide the case. A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent."[142] The jury was aware, of course, that they were the final arbiters of defendant's guilt. Accordingly, there was no error and defendant's claim must fail.

---

[140] See *People v Schutte*, 240 Mich App 713, 721 (2000)(The prosecutor's remarks concerning the signing of the search warrant did not imply that the judge had special knowledge of the case or that the judge's decision to issue the warrant constituted a judicial expression of support for the prosecutor's case. The prosecutor was merely stating that the police had obtained a search warrant and that they followed proper procedures to obtain the warrant. These facts were already in evidence and the prosecutor was permitted to argue the evidence and all reasonable inferences arising from it.)

[141] *People v Hoffman*, 205 Mich App 1, 21-22 (1994)("Nor did he place the prestige of his office behind the statement that 'we believe through investigation we have identified the perpetrator of this particular murder.' This innocuous observation preceded remarks about the evidence presented during a lengthy murder trial. The prosecutor essentially asked the jury to decide the case on the basis of the evidence and to render a fair and impartial verdict.").

[142] 8/5, 156.

iii. The prosecutor did not err in saying defendant changed his story from accidental discharge to self defense after hearing the evidence and consulting his attorney.

Next, defendant argues that the prosecutor accused defense counsel of coaching defendant to lie. Specifically, she argued:

> He says I shot it accidently it doesn't off accidently. Therefore, the evidence is clear that he committed this murder. He gets charged.
>
> His lawyer gets the information. His lawyer knows that the gun just doesn't go off accidently. And low and behold we have to come up with a whole new defense ladies and gentlemen.
>
> We have to come up with the different theory so I can be acquitted. So you can send me home.
>
> ***
>
> You know, and when you read that instruction [self-defense] one of the things that I want to tell you is the self-defense came after it was clear that the accident wouldn't work. After it was clear that all experts says the gun doesn't go off accidently. And was that testimony kinda coached?[143]

A prosecutor is permitted to argue from the facts that the defendant or defendant's witnesses are unworthy of belief.[144] But a prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury.[145] The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities.[146]

---

[143] 8/6, 93, 96-97.

[144] *People v Dobek*, *supra*, 274 Mich App at 67 (citation omitted).

[145] *People v Kennebrew*, 220 Mich App 601, 607-608 (1996); *People v Dalessandro*, 165 Mich App 569, 580 (1988).

[146] See *People v Phillips*, 217 Mich App 489, 497-498 (1996).

Here, the prosecutor's unobjected-to remark about how defendant's story changed over time was based on the evidence and did not amount to an improper personal attack on defense counsel. To the contrary, the comment was aimed at attacking the defendant's credibility, which was a completely proper argument for the prosecutor to make.[147] It is not improper for a prosecutor to argue that the defendant—being present during trial—has had an opportunity to conform his testimony to other witnesses.[148] In this case, the prosecutor's argument was entirely grounded in the facts: that defendant vacillated between accidental discharge and self-defense and that his story changed at trial after hearing the evidence that the gun could not accidentally discharge.[149]

This case is distinguishable from *People v Dalessandro*, relied on by defendant.[150] At no point did the prosecutor specifically state that defense counsel coached defendant or presented lies to the jury. The prosecutor did not single out any action or alleged action by defense counsel or insinuate that she had some special knowledge regarding whether defendant was testifying truthfully. Instead, the prosecutor relied on the facts in the record and properly argued that defendant's version

---

[147]*People v Buckey*, 424 Mich 1, 14-15 (1985)("It is well established that the prosecutor may comment upon the testimony and draw inferences from it and may argue that a witness, *including defendant*, is not worthy of belief.")(emphasis added).

[148]*Id* at 15-16.

[149]Defendant completely mischaracterizes the record (and even underlines the point on pages 46-47 of his Application) by arguing that defendant said he acted in self-defense within minutes of when the police arrived. But what defendant actually said is that *the gun he used* was for self-defense, not that *his actions* were in self-defense. Defendant himself clarified this when he testified. 8/4, 185. Defendant's initial statement to police was that the gun just discharged.

[150]*People v Dalessandro*, *supra*, 165 Mich App 580.

of events changed over time; accordingly, there was no error.[151] A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to the theory of the case, including that a witness is not worthy of belief.[152] Consequently, defendant fails to show plain error.

Further, the trial court's instructions cured any alleged error. The trial court instructed the jury the following:

> Evidence includes only the sworn testimony of witnesses and the exhibits that were admitted into evidence. Many things are not evidence. And you must be careful not to consider them as such. I will now describe of the things that are not evidence.
>
> The fact that the defendant is charged with a crime and is on trial, is not evidence. *The lawyers statements and arguments are not evidence*. They're only meant to help you understand the evidence and each sides legal theories. because the trial court instructed the jury to not consider the arguments of the lawyers when making a decision, any error was cured by the trial court's instruction.[153]

The trial court's instructions to the jury that the attorney's arguments were not evidence eliminated any potential prejudice.[154]

---

[151] *People v Thomas*, 260 Mich App 450, 453-454 (2004). See *People v Watson*, 245 Mich App 572, 592-593 (2010), citing *People v Messenger*, 221 Mich App 171, 181 (1997). ("However, the prosecutor's comments must be considered in light of defense counsel's comments."). *Watson*, *supra* at 592-593 ("an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.").

[152] *People v Fisher*, 220 Mich App 133, 156 (1996); *People v Launsburry*, 217 Mich App 358, 361 (1996).

[153] 8/5, 157.

[154] *People v Gaines*, 306 Mich App 289, 309 (2014).

iv. The prosecutor was not appealing for sympathy when she responded to defendant's arguments regarding the victim's intoxication by saying the victim still did not deserve to die.

Finally, defendant claims that the prosecutor impermissibly attempted to evoke sympathy for the victim during her unobjected-to comment that the victim did not deserve to die even if she was both drunk and high that night.[155] While it is true that appeals to the jury to sympathize with the victim are improper, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case.[156] In doing so, the prosecutor is not limited to the blandest possible presentation of the case and the evidence. Thus, a prosecutor may touch on subject matter that might arouse jurors' sympathy when arguing the evidence and its reasonable inferences in relation to her theory of the case.[157] Further, as mentioned above, the prosecutor is free to respond to defense counsel's arguments.[158]

Here, the prosecutor's rebuttal argument was in response to defense counsel's argument that focused on the victim's actions and claimed that "alcohol is what caused all of this." Specifically, defense counsel went through a comparative time-line of what defendant was doing the night of the offense (just getting ready for bed and sleeping) and what the victim was doing the night of the offense (drinking and smoking marijuana with her friend, sneaking out of the house, getting in a car accident). In other words, defense counsel was highlighting the victim's actions and essentially

---

[155] 8/6, 99-100; *People v Watson*, *supra*, 245 Mich App at 591.

[156] *People v Bahoda*, *supra*, 448 Mich at 282.

[157] *Id.* at 282; *see People v Cowell*, 44 Mich App 623, 628-629 (1973)(Noting that the prosecutor "is, after all, an advocate and he has not only the right but the duty to vigorously argue the people's case.").

[158] *People v Watson*, *supra*, 245 Mich App at 593 (citation omitted).

arguing that this murder was entirely the victim's fault.[159] In response, the prosecutor accurately argued that defense counsel was trying to attack the victim by focusing on how she was drunk and high. This was not an improper appeal for sympathy; it was a fair response to defense counsel's argument.

Likewise the prosecutor's comment that "we've got a dead 19 year old" was not an improper appeal for sympathy.[160] The "sympathy" evoked, if any, was derived from the unfortunate facts of this case, not by any intentional effort by the prosecutor to deflect the jurors from the facts.

Further, even if this Court finds that the prosecutor's comments were improper, any error was cured by the jury instructions.[161] The trial court gave the following instruction:

> Remember that you have taken an oath to return true and just verdict based only on the evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision. As jurors you must decide what the facts of this case are. This is your job and nobody else's.[162]

Because the trial court properly instructed the jury to not be influenced by sympathy or prejudice, any alleged error was cured by the instructions. Therefore, defendant's final claim of prosecutorial error must fail.

---

[159] 8/6, 64-67.

[160] 8/6, 99.

[161] *People v Watson*, *supra*, 245 Mich App at 592 (error was cured by trial court's instruction to the jury to not be influenced by sympathy or prejudice.).

[162] 8/5, 155-156.

D. Even if any of the prosecutor's comments were erroneous, defendant cannot establish outcome-determinative prejudice.

Overall, even if any of the prosecutor's comments were erroneous, defendant cannot establish outcome-determinative prejudice. Given the facts—especially that the victim was not acting belligerently just hours before her death, that there was no signs of forced entry, that the unarmed victim was found on defendant's porch with her feet at least a couple feet from the door, that defendant was mad when he opened his locked door, and that defendant could not make up his mind whether he fired accidentally or in self-defense— any potential errors in the closing arguments were not outcome-determinative. As mentioned *supra*, the properly instructed jury clearly found evidence beyond a reasonable doubt that defendant did not act with an honest and reasonable belief that the use of deadly force was immediately necessary to defend himself.

Ultimately, the Court of Appeals correctly concluded that the prosecutor's conduct did not deny defendant a fair trial. Accordingly, defendant's application for leave to appeal should be denied.

Relief

THEREFORE, the People ask this Honorable Court to deny defendant's application for leave to appeal.

Respectfully submitted,
KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

/s/ TONI ODETTE

TONI ODETTE (P72308)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-2698

June 21, 2016